

Secretary's Order No.: **2008-F-0059**

RE: Proposed Amendments to Delaware's
Horseshoe Crab Regulations as follows:
3203 – Seasons and Area Closed to Taking Horseshoe Crabs
and
3214 – Horseshoe Crab Annual Harvest Limit

Date of Issuance: December 11, 2008

Effective Date of the Amendment: January 11, 2009

I. Background:

A public hearing was held on Monday, November 3, 2008, in the Richardson and Robbins Auditorium of DNREC, 89 Kings Highway, to receive public comment on proposed amendments to Delaware's horseshoe crab regulations, specifically, regarding only Sections 3203 (Seasons and Area Closed to Taking Horseshoe Crabs) and 3214 (Horseshoe Crab Annual Harvest Limit). The Department is proposing regulation amendments designed to be in compliance with the provisions of the Atlantic States Marine Fisheries Commission Addendum V to the Interstate Fishery Management Plan for Horseshoe Crab. These proposed amendments would extend for another year the prohibition on the harvest and landing of all horseshoe crabs in Delaware waters from January 1 through June 7, and prohibit the harvest and landing of female horseshoe crabs for the remainder of the year. During the period of June 8 through December 31, up to 100,000 male horseshoe crabs may be harvested from approved harvest areas in Delaware. These harvest limits may be extended for a second year, according to the

provisions of Addendum V, provided the Atlantic States Marine Fisheries Commission elects to do so.

In addition, it is proposed that where beach collecting is presently legal, that beach collecting of horseshoe crabs be allowed to continue until July 31 of each year. Since no harvesting is allowed prior to June 8, and most of the migratory shorebirds that feed on horseshoe crab eggs will have departed from the Delaware Bay by then, there should be no additional impacts to shorebirds from allowing harvesting to extend beyond the last day of June until the end of July. By harvesting only male horseshoe crabs, females would be fully protected and will be available to participate in the annual spawn without being subject to harvest at any point during the year.

Given the much narrower scope of the present proposed amendments to Delaware's Horseshoe Crab Regulations, the public comment received by the Department regarding this matter was greatly reduced from that which was received during previous horseshoe crab regulatory amendment promulgation matters. Nevertheless, public comment was received by the Department, voicing both support and opposition, to these proposed changes to Section 3203 and 3214 of Delaware's existing horseshoe crabs regulations. Environmental groups, as well as individual citizens, forwarded documentation to the Department, which also became part of the record in this case. Proper notice of this hearing was provided, as required by law.

II. Findings:

The Department has provided appropriate reasoning, scientific analysis, and sound conclusions with regard to the drafting of these regulation amendments and consideration of the public comments received, as reflected in the Hearing Officer's Report of December 8, 2008, which is attached and expressly incorporated into this Order. Moreover, the following findings and conclusions are entered at this time:

1. The Department has jurisdiction under its statutory authority to make a determination in this proceeding, to wit: 7 Del.C. §103, §1902, §2701 and §2703; and Chapter 15 of 7 Delaware Code.
2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations.
3. The Department held a public hearing in a manner required by the law and regulations.
4. The Department considered all timely and relevant public comments in making its determination.
5. The Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the

recommendations as proposed should be applicable to all Delaware citizens equally.

6. Formal promulgation of these proposed amendments would update Delaware's current regulations, so that Delaware will be in compliance with Addendum V to the Interstate Fishery Management Plan for Horseshoe Crab, issued by the Atlantic States Marine Fisheries Commission (ASMFC).
7. Once promulgated, this regulation may be extended for an additional year beyond 2009, pending approval by ASMFC.
8. Once promulgated, Delaware will maintain a closed season on the harvest of horseshoe crabs from January 1 through June 7. No horseshoe crabs may be taken during that time period.
9. Beginning June 8, and lasting until the end of the year, up to 100,000 male horseshoe crabs may be taken for purposes of bait reduction, or bait generation, from approved harvest areas in Delaware.
10. No female horseshoe crabs may be taken at any time during the year, including the period when males may be taken.
11. Where beach collecting is presently legal, beach collecting of horseshoe crabs shall be allowed to continue until July 31 of each year.

12. Existing regulations allow dredging of horseshoe crabs beginning July 1 by five permitted dredgers selected by lottery, so both forms of harvesting may continue into July until the harvest quota has been met.
13. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;
14. The Department's proposed regulation, as published in the October 1, 2008 *Delaware Register of Regulations* and set forth within Attachment "A" hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*;
- 15.** The Department shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

III. Order:

Based on the record developed, as reviewed in the Hearing Officer's Report dated December 8, 2008, and expressly incorporated herein, it is hereby ordered that the proposed amendments to State of Delaware Horseshoe Crab Regulations as follows: 3203 – Seasons and Area Closed to Taking Horseshoe Crabs; and 3214 – Horseshoe Crab Annual Harvest Limit - be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of the amendments to Delaware's Regulations regarding the harvesting of horseshoe crabs is a reasonable action for the Department to take at this time, as it will bring Delaware into compliance with Addendum V to the Interstate Fishery Management Plan for Horseshoe Crabs, issued by ASMFC. Failure to amend the existing horseshoe crab harvesting regulations would result in federal sanctions being taken against Delaware, including, but not limited to, the federal government closing Delaware's horseshoe crab fishery. Such actions would result in economic detriment to Delaware's fishermen, and therefore it is reasonable to enact these regulatory amendments at this time to prevent such detriments to Delaware's economy from occurring.

Conservation measures with regard to the harvesting of the horseshoe crab began to be applied in Delaware by ASMFC starting in 1999. Over the years subsequent to those measures being implemented, there are data indicating that the horseshoe crab population has

stabilized and has begun to increase. The proposed harvest of 100,000 male horseshoe crabs would result in a taking of a very small percentage of this species' overall population, and thus it is believed to not be detrimental to the overall population of this species.

In developing this regulation, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the economic interests and public concerns surrounding the same, in furtherance of the policy and purposes of 7 Del.C. §103, §1902, §2701 and §2703, and Chapter 15 of 7 Delaware Code.

/s/David S. Small, acting for
John A. Hughes
Secretary

HEARING OFFICER'S REPORT

REGARDING: Proposed Amendments to Delaware's
Horseshoe Crab Regulations as follows:
3203 – Seasons and Area Closed to Taking Horseshoe Crabs
and
3214 – Horseshoe Crab Annual Harvest Limit

Lisa A. Vest
Hearing Officer

December 8, 2008

1. Background Findings:

A public hearing was held on Monday, November 3, 2008, in the Richardson and Robbins Auditorium of DNREC, 89 Kings Highway, to receive public comment on proposed amendments to Delaware's horseshoe crab regulations, specifically, regarding only Sections 3203 (Seasons and Area Closed to Taking Horseshoe Crabs) and 3214 (Horseshoe Crab Annual Harvest Limit). The Department is proposing regulation amendments designed to be in compliance with the provisions of the Atlantic States Marine Fisheries Commission Addendum V to the Interstate Fishery Management Plan for Horseshoe Crab. These

proposed amendments would extend for another year the prohibition on the harvest and landing of all horseshoe crabs in Delaware waters from January 1 through June 7, and prohibit the harvest and landing of female horseshoe crabs for the remainder of the year. During the period of June 8 through December 31, up to 100,000 male horseshoe crabs may be harvested from approved harvest areas in Delaware. These harvest limits may be extended for a second year, according to the provisions of Addendum V, provided the Atlantic States Marine Fisheries Commission elects to do so.

In addition, it is proposed that where beach collecting is presently legal, that beach collecting of horseshoe crabs be allowed to continue until July 31 of each year. Since no harvesting is allowed prior to June 8, and most of the migratory shorebirds that feed on horseshoe crab eggs will have departed from the Delaware Bay by then, there should be no additional impacts to shorebirds from allowing harvesting to extend beyond the last day of June until the end of July. By harvesting only male horseshoe crabs, females would be fully protected and will be available to participate in the annual spawn without being subject to harvest at any point during the year.

Given the much narrower scope of the present proposed amendments to Delaware's Horseshoe Crab Regulations, the public comment received by the Department regarding this matter was greatly reduced from that which was received during previous horseshoe crab

regulatory amendment promulgation matters. Nevertheless, public comment was received by the Department, voicing both support and opposition, to these proposed changes to Section 3203 and 3214 of Delaware's existing horseshoe crabs regulations. Environmental groups, as well as individual citizens, forwarded documentation to the Department, which also became part of the record in this case. All such documentation, along with the public comment received at the hearing, will be discussed in greater detail below. Proper notice of this hearing was provided, as required by law.

II. Summary of Record:

A. Department's Exhibits:

Roy Miller, Administrator of the Fisheries Section with the Department's Division of Fish and Wildlife, introduced the Department's eight (8) exhibits into the record at the public hearing on November 3, 2008, as follows:

1. Copy of Start-Action Notice #2008-22, notifying all concerned of the Department's intent to amend Delaware's Shellfish Regulations 3203 and 3214;
2. Copy of affidavit of publishing original legal notice of this hearing, and the intent and purpose of this hearing, published in The News Journal, as of October 5, 2008;
3. Copy of affidavit of publishing the revised legal notice (noting the change in date of the public hearing from October 30, 2008

to November 3, 2008) in the Wilmington News Journal, dated October 10, 2008;

4. Copy of affidavit of publishing original legal notice of this hearing, and the intent and purpose of this hearing, published in the Delaware State News, as of October 3, 2008;
5. Copy of affidavit of publishing the revised legal notice (noting the change in date of the public hearing from October 30, 2008 to November 3, 2008) in the Delaware State News, dated October 10, 2008;
6. Copy of the proposed amendments to Delaware's existing Horseshoe Crab regulations, as it appeared in the Delaware Register of Regulations, Volume 11, Issue 4, on October 1, 2008;
7. Copy of the public hearing notice issued by the Department on October 7, 2008, noticing the public hearing of November 3, 2008; and
8. Copy of Addendum V to the Interstate Fishery Management Plan for Horseshoe Crabs, as published by the Atlantic States Marine Fisheries Commission in September 2008.

Mr. Miller took time at the public hearing to provide the public with a brief history of these horseshoe crab regulations, and went through each and every proposed amendment to the aforementioned existing Delaware Shellfish Regulations, thus making sure that

everyone in attendance at the hearing was fully aware of what was being proposed by the Department with regard to these matters.

Mr. Miller explained to those in attendance at the public hearing on November 3, 2008 that Addendum IV to the Interstate Fishery Management Plan for horseshoe crabs was approved by the United States Marine Fisheries Commission, such that it would go into effect in 2007, and last through 2008. That particular measure has actually expired, and all of the states from New Jersey to Virginia are in need of regulations to continue through 2009. Hence, Addendum V was passed by the Atlantic States Marine Fisheries Commission, calling for “status quo” for the states of Delaware, Maryland, Virginia, and New Jersey.

New Jersey, by act of their legislature, chose to be more conservative than called for in the aforementioned Addendums IV and V, and implemented a full harvest moratorium, which is allowed under the Atlantic States Marine Fisheries Commission enabling legislation. A state or jurisdiction can be more restrictive than the Plan, but not less restrictive. Delaware chose, after a fairly long and involved process, to implement the Atlantic States Marine Fisheries Commission Addendum IV, and the Department is at this time proposing to implement Addendum V, which takes the Addendum IV measures and extends them for another year.

Mr. Miller went on to explain that, when the Commission meets at the end of 2009, they may or may not vote to extend these measures for yet another year. If they do, the Department is proposing within these present amendments that Delaware also be allowed to extend the measures for a second year without having to go through the hearing process. Thus, if the Commission extends said measures for another year, Delaware would do the same automatically.

In brief, the proposed amendments which are the subject of this promulgatory matter would, if ordered by the Secretary, result in the following regulations to be in effect, as follows, to wit:

- There is a closed season on the harvest of horseshoe crabs from January 1 through June 7. No horseshoe crabs may be taken during that time period.
- Beginning June 8, and lasting until the end of the year, up to 100,000 male horseshoe crabs may be taken for purposes of bait reduction, or bait generation, from approved harvest areas in Delaware.
- No female horseshoe crabs may be taken at any time during the year, including the period when males may be taken.
- Where beach collecting is presently legal, beach collecting of horseshoe crabs shall be allowed to continue until July 31 of each year.

- Existing regulations allow dredging of horseshoe crabs beginning July 1 by five permitted dredgers selected by lottery, so both forms of harvesting may continue into July until the harvest quota has been met.

For the Secretary's review and understanding, a copy of the Department's proposed amendments to Delaware's existing Horseshoe Crab Regulations are attached hereto as Attachment "A", and are expressly incorporated herein.

B. Public Comments:

As noted above, there were public comments offered into the record by various members of the public at the hearing of November 3, 2008. Additionally, this Hearing Officer received numerous emails from the public, as well as documentation from environmental groups during the pre-hearing phase of this regulatory matter. Those comments will now be addressed herein.

Although, as previously noted, the public participation and commenting were very much reduced from that of prior years, there were still some members of the public who wanted their comments incorporated into the record in this matter. For brevity's sake, a brief summary will be made of each set of comments, while the actual written comments entered into the record will be attached hereto for the Secretary's review.

1. Rick Robbins, on behalf of Chesapeake Bay Packing, LLC, and Bernie's Conchs, LLC:

In his email forwarded to this hearing officer on October 30, 2008, Mr. Robbins voiced support of the Department's proposed regulatory amendments in this matter, as they are intended to comply with Addendum IV's regulatory requirements for a period of one year, with a one-time extension option of those provisions by ASMFC Board vote for Addendum V. Specifically, Mr. Robbins noted that "Delaware is to be applauded for its risk-averse management of the Delaware Bay horseshoe crab resource as a multi-user resource, consistent with the goals of the ASMFC FMP". Mr. Robbins' comments are attached hereto as Attachment "B", and are expressly incorporated herein to this report.

2. John Nicosia:

In his email to this Hearing Officer of October 7, 2008, Mr. Nicosia voiced his agreement with DNREC's current position of total restriction of harvesting female crabs. He notes that "the results to date are encouraging", and that he would be supportive of even stronger restrictions. Mr. Nicosia's email is attached hereto as Attachment "C", and is expressly incorporated herein as well.

3. Collective Comments Supporting a Moratorium on Horseshoe Crab Harvesting/Protection of the Red Knot Migratory Bird

There were numerous comments and documentation provided to this Hearing Officer, both from individual members of the public and from environmental groups, which voiced support for the Department to enact a complete moratorium on horseshoe crab harvesting. As was the case in years past here in Delaware, there is a great deal of passion in the public sector with regard to this issue. According to the comments received by this Hearing Officer during all phases of this hearing record, one of the main reasons behind the desire for this 100% moratorium is to save the red knot, as well as other shorebirds that frequent the Delaware Bay. Documentation has been provided from various environmental groups concerning the plight of these shorebirds, the red knot in particular, and how it is in jeopardy of becoming extinct in the near future. Those who champion the plight of the red knot state that the primary cause of this species' population decline is the diminished supply of horseshoe crab eggs spawned on Delaware Bay beaches. Red knots, according to this documentation, rely on these eggs to give them the sustenance they need to complete the last leg of their migration from the Delaware Bay to their breeding grounds in the Canadian Arctic. Many of these birds migrate from as far south as the tip of South America.

Those in support of this complete moratorium also assert that such action makes good economic sense, as they believe that Delaware receives a greater economic benefit from a healthy shorebird population than it does from the small population of fishermen who harvest horseshoe crabs, as well as fishing other species, to make a living. They further state that studies done by the New Jersey Department of Environmental Protection and the USFWS show that Delaware Bay ecotourism and the non-lethal biomedical value of horseshoe crabs is worth much more than eel and conch fisheries. Both of these fisheries rely primarily on horseshoe crabs as the preferred bait. In sum, the public comments falling into this category supported Secretary Hughes' imposition of a moratorium on the annual horseshoe crab taken two years ago, and asks the Department to once again take that path with regard to enacting its regulatory amendments in this matter at this time.

Attached as Attachment "D", also being expressly incorporated into this Hearing Officer's report at this time, is the documentation provided to this Hearing Officer by the Delaware Nature Society, the Delaware Riverkeeper Network, Amy Roe (individual citizen), the Coalition to Protect Our Environment, and several examples of the identical emails received from numerous members of the Defenders of Wildlife. These environmental groups

believe that the call for a 100% moratorium is an option which will not only maximize the opportunities to increase the number of horseshoe crab eggs available for these migratory shorebirds, but also will aid in restoring the population of horseshoe crabs themselves. Such comments further assert that a moratorium is within the statutory authority of the Department, and that DNREC has an obligation to establish such a moratorium, given the scientific data they provide with regard to the horseshoe crab-shorebird connection, the present depleted status of the Red Knot, and the opinions provided previously to the ASMFC and the Shorebird Technical Committee that the scarcity of eggs is the main reason for the Red Knot's population decline.

III. Findings and Conclusions:

It is the purpose of this Department to protect Delaware's natural resources throughout the State of Delaware. In the matter currently before the Secretary, once again a careful balance must be made between actions taken by the Department to protect our natural resources, and actions taken to protect Delaware's economic interests and the concerns of those citizens whose livelihood is derived from the fishing industry and the harvesting of horseshoe crabs.

The regulations as proposed by the Department at this time are reasonable. Delaware must formally update its current regulations by amending them to come into compliance with Addendum V to the

Interstate Fishery Management Plan for Horseshoe Crab, issued by ASMFC. Failure to do so would result in federal sanctions being suffered by Delaware, which could potentially include the federal government closing Delaware's horseshoe crab fishery. Such actions would result in economic detriment to Delaware's fishermen, and therefore it is reasonable to take such steps as are being proposed at this time to prevent such actions from occurring. The question then becomes how stringent Delaware's regulations should be in order to protect the natural resource which is the subject of this promulgation, namely, the horseshoe crab.

Much of the scientific data provided to the Department as a result of the public hearing of November 3, 2008 mirrored that which was previously reviewed rigorously by the Delaware Superior Court in its June 8, 2007 memorandum opinion. As the Department is well aware, the Court did not find the full moratorium implemented by the Department two years ago to have a rational basis. Instead, the Court found regulations in favor of the moratorium to be speculative and, ultimately, invalid. Thus, it is illogical for the Department to go down that same path again at this juncture.

With regard to those comments regarding the plight of the Red Knot and other migratory shorebirds known to the Delaware Bay, the fact remains that the Red Knot is not the subject of this regulatory action. Additionally, the Court noted in its Memorandum Opinion of

June 8, 2007 that the population of the Red Knot was leveling. At the time of the public hearing on November 3, 2008, Mr. Miller noted that, in light of the Court's previous opinion regarding a proposed moratorium here in Delaware, coupled with the scientific data illustrating positive indicators of horseshoe crab resurgence, the Department has chosen to stay the course and amend Delaware's existing regulations to mirror the ASMFC's Addendum V at this time.

In responding to some of the concerns offered by Faith Zerbe of the Delaware Riverkeeper Network at the aforementioned public hearing, Mr. Miller confirmed that, even though New Jersey has now, in fact, enacted a moratorium on Horseshoe Crab harvesting, New Jersey residents would be unable to obtain a license in Delaware to harvest horseshoe crabs. Thus, there is no cause for concern with regard to persons "crossing over" between New Jersey and Delaware to harvest here in Delaware. Additionally, Mr. Miller indicated to Ms. Zerbe at the hearing that the Department is confident in its ability to provide enforcement of these regulations with respect to the legal seasons for harvesting and beach collection of Delaware's horseshoe crab.

It should also be noted that the Department has reviewed these proposed amendments in the light of the Delaware Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the amendments as proposed should be applicable to all Delaware citizens equally, so that Delaware will be in compliance with Addendum

V to the Interstate Fishery Management Plan for Horseshoe Crab, issued by ASMFC.

Based on the record developed in the course of this hearing, this Hearing Officer hereby concludes that the record does warrant, and that the Department has provided appropriate reasoning, regarding the need for the proposed amendments to the Delaware Shellfish Regulations regarding the harvesting of horseshoe crabs, and has thoroughly addressed the public's questions and/or comments provided during the various phases of the record developed in this matter.

IV. Recommendations:

Based on the above discussion, and for the reasons stated above, I hereby recommend promulgation of these proposed amendments to the Delaware Regulations regarding the harvesting of horseshoe crabs, in the customary manner provided by law. I also recommend that the following findings be made with regard to this matter:

16. The Department has jurisdiction under its statutory authority to make a determination in this proceeding, to wit: 7 Del.C. §103, §1902, §2701 and §2703; and Chapter 15 of 7 Delaware Code.
17. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations.
18. The Department held a public hearing in a manner required by the law and regulations.

19. The Department considered all timely and relevant public comments in making its determination.
20. The Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally.
21. Formal promulgation of these proposed amendments would update Delaware's current regulations, so that Delaware will be in compliance with Addendum V to the Interstate Fishery Management Plan for Horseshoe Crab, issued by the Atlantic States Marine Fisheries Commission (ASMFC).
22. Once promulgated, this regulation may be extended for an additional year beyond 2009, pending approval by ASMFC.
23. Once promulgated, Delaware will maintain a closed season on the harvest of horseshoe crabs from January 1 through June 7. No horseshoe crabs may be taken during that time period.
24. Beginning June 8, and lasting until the end of the year, up to 100,000 male horseshoe crabs may be taken for purposes of bait reduction, or bait generation, from approved harvest areas in Delaware.

25. No female horseshoe crabs may be taken at any time during the year, including the period when males may be taken.
26. Where beach collecting is presently legal, beach collecting of horseshoe crabs shall be allowed to continue until July 31 of each year.
27. Existing regulations allow dredging of horseshoe crabs beginning July 1 by five permitted dredgers selected by lottery, so both forms of harvesting may continue into July until the harvest quota has been met.
28. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;
29. The Department's proposed regulation, as published in the October 1, 2008 *Delaware Register of Regulations* and set forth within Attachment "A" hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*;
30. The Department shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

In addition, I recommend issuing the attached Secretary's Order to effectuate this purpose and adopting the Hearing Officer's findings and conclusions as expressed hereinabove.

/s/ Lisa A. Vest .
LISA A. VEST,
Hearing Officer

Ahear/HORSESHOE CRAB AMEND.2008